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Regan v. Wald: Expansion of Authority under the International Emergency Economic Powers Act

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NOTES

***Regan v. Wald*: Expansion of Authority Under the International Emergency Economic Powers Act**

In a suit challenging the validity of amendments to a Treasury Department regulation that prohibits travel to Cuba for most persons,¹ the United States Supreme Court upheld the ban on travel in *Regan v. Wald*.² The decision expands the President's authority to impose economic restrictions under a savings clause of the International Emergency Economic Powers Act (IEEPA).³ Further, *Wald*

¹ 31 C.F.R. § 515.560 (1984) was amended to its current state in 1982 and revoked the general license that permitted payment of travel-related expenses in Cuba. Entitled "Certain transactions incident to travel to and within Cuba," the regulation limits payment of "all transportation related transactions ordinarily incident to travel to and from Cuba" and "all transactions ordinarily incident to travel within Cuba, including payment of living expenses and the acquisition in Cuba of goods for personal consumption there" to certain persons. Included in the group for whom travel is permitted by specific license are, among others, government officials traveling on official business, persons traveling for the purpose of gathering news or engaging in professional research, and persons traveling to visit close relatives in Cuba.

Tourist travel or business travel not in conjunction with one of the purposes set out in § 515.560(a)(1)(i) is specifically not authorized in § 515.560(a)(3). Section 515.560(b) provides that specific licenses may be granted to authorize travel in appropriate cases "for humanitarian reasons, or for purposes of public performances, public exhibitions, or similar activities." In addition, § 515.560(j) provides that "transactions involving fully sponsored or hosted travel to, from, and within Cuba are authorized, provided that no person subject to U.S. jurisdiction shall make any payment or transfer of any property or provision of any service to Cuba or a Cuban national in connection with such travel."

² 104 S. Ct. 3026 (1984).

³ 50 U.S.C. §§ 1701-1706 (1982). The savings provisions of the IEEPA are contained in § 1706(a):

(a) Termination of national emergencies pursuant to National Emergencies Act

(1) Except as provided in subsection (b) of this section, notwithstanding the termination pursuant to the National Emergencies Act [50 U.S.C. §§ 1601-1651 (1981)] of a national emergency declared for purposes of this chapter, any authorities granted by this chapter, which are exercised on the date of such termination on the basis of such national emergency to prohibit transactions involving property in which a foreign country or national thereof has any interest, may continue to be so exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

(2) Notwithstanding the termination of the authorities described in section 101(b) of this Act, any such authorities, which are exercised with respect to a country on the date of such termination to prohibit transactions involving any property in which such country or any national thereof has any inter-

eliminates the need for the President to follow the IEEPA consultative procedures⁴ in imposing new restrictions toward a country if some authority was exercised under section 5 of the Trading With the Enemy Act (TWEA)⁵ toward that country at the time the IEEPA was enacted. Finding sufficient foreign policy considerations to justify such restrictions with respect to Cuba,⁶ the Court ruled that Wald's constitutional right to travel was not violated. The Court broadly interpreted the scope of the savings clause, which grandfathered in authority exercised under section 5 of the TWEA. It further noted that it would continue its traditional deference to the executive branch in such matters.⁷

Wanting to travel to Cuba, plaintiff Wald sought an injunction to prevent enforcement of the amended regulation in the District Court for the District of Massachusetts.⁸ Concluding that Wald had not shown a substantial likelihood of success on the merits, the court denied the preliminary injunction.⁹

On appeal, Wald argued that the amendment of the TWEA in 1977, which effectively limited the President's power to impose economic sanctions subsequent to a declaration of national emergency,

est, may continue to be exercised to prohibit transactions involving that property if the President determines that the continuation of such prohibition with respect to that property is necessary on account of claims involving such country or its nationals.

Id.

⁴ 50 U.S.C. § 1703 (1982). The consultative procedures of the IEEPA provide for a greater role by Congress once the President has declared a national emergency. The provision includes:

(a) Consultation with Congress

The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.

(b) Report to Congress upon exercise of Presidential authorities

Whenever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying—

(c) Periodic follow-up reports

At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) of this section with respect to an exercise of authorities under this chapter, the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred concerning any information previously furnished pursuant to paragraphs (1) through (5) of subsection (b) of this section.

(d) Supplemental requirements

The requirements of this section are supplemental to those contained in title IV of the National Emergencies Act [50 U.S.C.A. § 1641].

Id.

⁵ Ch. 106, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. app. §§ 1-44 (1982)).

⁶ *Wald*, 104 S. Ct. at 3039.

⁷ *Id.*

⁸ *Id.* at 3029-30.

⁹ *Id.* at 3030.

and the simultaneous enactment of the IEEPA require that the President follow the consultative procedures set out by IEEPA before travel restrictions could be effective.¹⁰ Furthermore, Wald asserted that the savings clause of the IEEPA, which grandfathered in section 5 restrictions in force at the time of its enactment, was ineffective to grandfather the travel restrictions, because no travel restrictions had been in effect when the savings clause was enacted.¹¹ Finally, Wald argued that even if the restrictions were found to have been effected properly, they violated his constitutional right to travel.¹²

The Court of Appeals for the First Circuit vacated the district court order and remanded with instructions to issue the preliminary injunction.¹³ The court ruled that the Government was required to follow the consultative procedures of the IEEPA in setting forth the travel restrictions, and therefore, the amendments to the Treasury Department regulation were invalid for lack of statutory authority.¹⁴

The Government filed a petition for rehearing and asked for an additional stay of mandate of thirty days in the event the rehearing was denied to decide whether to seek certiorari.¹⁵ In its petition for rehearing the Government argued that it was exercising its authority to restrict travel when the savings clause became effective. It stated that the general license that allowed transactions incident to travel to, from, and within Cuba did not negate the effectiveness of the general prohibition against all transactions with Cuba that had been in effect since 1963.¹⁶

¹⁰ *Id.* at 3032. Both the Government and Wald agree that the consultative procedures were not followed when 31 C.F.R. § 515.560 was amended in 1982. The Government, however, maintains that it was not required to follow the IEEPA consultative procedures and relies on the grandfather clause of § 1703 for statutory authority for the amendment.

¹¹ *Id.* at 3032. The Government argues that, while specific restrictions on travel were not in effect at the time the grandfather clause was enacted, the "authority" to impose such restrictions was being exercised. It maintains that this authority was sufficient to grandfather in the amended travel restrictions.

¹² *Id.* at 3032. As the Supreme Court noted, the lower court did not reach this constitutional issue, because it held the regulation invalid for lack of statutory authority. *Wald v. Regan*, 708 F.2d 794, 795 (1st Cir. 1983) (en banc), *rev'd*, 104 S. Ct. 3026 (1984). The appellate court acknowledged a constitutional protection of the right to travel in its Memorandum and Order in response to the Government's petition for a stay of mandate. 708 F.2d at 803. The Supreme Court, however, was the first court to address the issue on the facts of this case. 104 S. Ct. at 3038-39.

¹³ 708 F.2d at 795.

¹⁴ *Id.*

¹⁵ *Id.* at 802-03.

¹⁶ *Id.* at 802. The Government initially argued that it was restricting travel at the time of the amendment because of a prohibition on all transactions with Cuba. See 31 C.F.R. § 515.201 (1984). A general license, Regulation 560, which was in effect in 1982, was enacted subsequent to § 515.201 and excepted travel from the total prohibition. It was first passed on March 21, 1977. Cuban Assets Control Regulations, 42 Fed. Reg. 16,621 (1977). It was amended on May 12, 1977 to further relax restrictions on travel-related

The First Circuit denied the petition for rehearing,¹⁷ finding that travel was not restricted on the effective date of the savings clause. The court examined the substance—whether travel in fact was restricted on July 1, 1977—rather than the form of the restrictions.¹⁸ Thus, the savings clause was not a sufficient statutory basis for the restrictions. The court also denied the petition for a stay of mandate,¹⁹ stating that while foreign policy considerations weigh in favor of a stay,²⁰ the protected right to travel weighs against such a stay.²¹ The court also noted that the Supreme Court had instructed courts to “construe narrowly all delegated powers that curtail or dilute” the right to travel.²²

The Supreme Court granted the Government’s request for a stay of mandate²³ and soon after granted the petition for certiorari.²⁴ Reversing the appellate court, the Supreme Court ruled for the Government in a five to four decision.²⁵ The Court found that the “authority” to regulate property transactions with Cuba was being exercised on July 1, 1977, the effective date of the savings clause.²⁶

transactions with Cuba. *Transactions Incidental to Authorized Travel to Cuba*, 42 Fed. Reg. 25,499 (1977).

The Government later argued that it was restricting Cuban travel because travelers could bring only \$100.00 worth of goods for personal use back to the United States, only nonscheduled flights were allowed, and domestic credit card issuers were restricted from contracting with Cuban enterprises. The court, however, rejected this argument, stating that the impact of these restrictions on travel was too minimal to cause it to alter its opinion. *Wald*, 708 F.2d at 802.

¹⁷ *Wald*, 708 F.2d at 802. The court also had noted that it was appropriate to discuss the Government’s requests and the court’s reasoning in detail because the Government had stated that the decision would have significant implications for foreign policy. The court then discussed the petition for rehearing and the petition for a stay of mandate separately in the Memorandum and Order. *Id.* at 802-04.

¹⁸ *Id.* at 802-03.

¹⁹ *Id.* at 802. The court also noted that if the thirty-day stay were granted, it would continue until final disposition by the Supreme Court if the Government filed a petition for certiorari, thus preventing *Wald* from traveling to Cuba during that time. *FED. R. APP. P.* 41(b).

²⁰ The right to travel has not been held to be absolute. “[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.” *Zemel v. Rusk*, 381 U.S. 1, 14 (1965) (footnote omitted). The Secretary of State’s refusal to validate passports of U.S. citizens for travel to Cuba has been upheld “because of foreign policy considerations affecting all citizens.” *Id.* at 13.

²¹ *Wald*, 708 F.2d at 803. “Freedom of travel is a constitutional liberty closely related to rights of free speech and association.” *Aptheker v. Secretary of State*, 378 U.S. 500, 517 (1964). “The right to travel is a part of the ‘liberty’ of which the citizen cannot be deprived without due process of law under the Fifth Amendment.” *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

²² *Kent*, 357 U.S. at 129. “If that ‘liberty’ is to be regulated, it must be pursuant to the law-making functions of the Congress.” *Id.*

²³ *Regan v. Wald*, 103 S. Ct. 3567 (1983).

²⁴ *Regan v. Wald*, 104 S. Ct. 479 (1983).

²⁵ *Wald*, 104 S. Ct. at 3039-40. The majority opinion was written by Justice Rehnquist. A dissenting opinion written by Justice Blackmun was joined by Justices Brennan, Marshall, and Powell. An additional dissenting opinion was written by Justice Powell.

²⁶ *Id.* at 3035.

The Court held that this was sufficient to bring newly imposed travel restrictions under the savings clause, even if the specific travel restrictions had not been in effect at the time of its enactment.²⁷

The Court reasoned that travel-related transactions, such as payment for meals, lodging, and transportation within Cuba, are transactions with respect to property in which Cuba or Cubans have an interest.²⁸ These transactions fall within the statutory language of the TWEA, because the President is authorized to regulate "any" transaction involving "any" property in which a foreign country or national has "any" interest.²⁹

The Court failed to find any indication in the legislative history that Congress intended to freeze existing restrictions when it amended the TWEA and enacted the IEEPA.³⁰ The Court ruled that because a broad prohibition on transactions with Cuba existed under the Cuban Assets Control Regulations when the savings clause was enacted on July 1, 1977, specific restrictions added after that date would be valid even if the consultative procedures set out in the IEEPA were not used.³¹

The Court found support for the decision in the general license that had allowed travel, but expressly was subject to revocation, amendment, or modification "at any time."³² According to the Court, the travel-related transactions "were specifically made subordinate to further actions which the President might take,"³³ and automatically became subject to the Cuban Assets Control Regulations when no longer specifically authorized.³⁴

Upholding the travel restrictions, the Court ruled that they did not violate Wald's right to travel guaranteed by the due process clause of the fifth amendment of the Constitution.³⁵ The Court

²⁷ *Id.*

²⁸ *Id.* at 3034. "For purposes of TWEA, it is clear that the authority to regulate travel-related transactions is merely part of the President's general authority to regulate property transactions." *Id.* (footnote omitted).

²⁹ See 31 C.F.R. § 515.201(b). Any emergency declaration can be used by the President in conjunction with § 5(b) of the TWEA to regulate economic transactions, and the regulations need not be specifically related to the emergency declaration under which they are imposed. Prior to passage of the National Emergencies Act of 1976, four national emergencies were in effect: President Roosevelt's 1933 declaration regarding the banking crisis, President Truman's 1950 declaration regarding the Korean War, President Nixon's 1970 declaration regarding the post office strike, and President Nixon's declaration regarding the 1971 balance of payments crisis.

³⁰ *Wald*, 104 S. Ct. at 3025. The Court emphasizes that if Congress had wanted to freeze the existing restrictions, it could have done so explicitly.

³¹ *Id.* at 3035.

³² 31 C.F.R. § 515.805 (1984). See *supra* notes 1 & 16.

³³ *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981).

³⁴ *Wald*, 104 S. Ct. at 3035. The Court noted that the source of all restrictions on property transactions relating to Cuba is Regulation 201(b), which is part of the Cuban Assets Controls Regulations.

³⁵ *Id.* at 3039-40. A protected right to travel was first recognized in *Kent v. Dulles*, 357

stated that there is a strong foreign policy justification for restricting travel to Cuba that is sufficient to restrict the fifth amendment right to travel.³⁶ The Court indicated that it would continue to defer to the political branches of the Government with regard to foreign policy issues rather than perform any independent foreign policy analysis of its own, and that matters relating "to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference."³⁷

Congress had given the President broad authority to restrict economic transactions with foreign nations during times of war and times of "national emergency" without congressional approval in section 5 of the TWEA.³⁸ Enacted originally in 1917, six months after the United States entered World War I, the TWEA was amended to its current state in 1977.³⁹ Congress narrowed the President's authority to act without congressional consultation at that time⁴⁰ and provided separate means for presidential imposition of economic restrictions pursuant to national emergencies.⁴¹

Section 5 of the TWEA now allows the President to exercise au-

U.S. 116 (1958), in which the Court held that the freedom to travel "is, indeed, an important aspect of the citizen's 'liberty.'" *Id.* at 127. See *supra* notes 20-22.

Referring to its prior decisions regarding freedom of travel, the Court noted that "[r]espondents' counsel undoubtedly speaks with some authority as to these cases, since he represented the would-be travelers in most of them." *Wald*, 104 S. Ct. at 3038.

³⁶ *Wald*, 104 S. Ct. at 3038-39. The Court stated that the restrictions in *Zemel* and in this case "are justified by weighty concerns of foreign policy." *Id.* at 3039. The foreign policy justification is to limit Cuba's access to hard currency, which could be used "in support of Cuban adventurism." *Id.*

³⁷ *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952).

³⁸ The President has delegated his authority under § 5(b) of the TWEA to the Treasury Secretary. Exec. Order No. 9193, 3 C.F.R. 1174, 1175 (1938-43 comp.), *reprinted in* 50 U.S.C.A. app. § 5 (West Supp. 1984).

³⁹ Prior to the 1977 amendment § 5(b)(1) provided in part:

During time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise

50 U.S.C.A. app. § 5(b)(1) (West Supp. 1984).

⁴⁰ In its amended form § 5(b)(1) applies only to time of war. It now reads:

During the time of war, the President may, through any agency that he may designate, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise

Id.

⁴¹ 50 U.S.C. § 1701, entitled "Unusual and extraordinary threat; declaration of national emergency; exercise of Presidential authorities" provides:

(a) Any authority granted to the President by section 1702 of this title may be exercised to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat.

(b) The authorities granted to the President by section 1702 of this title may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be exercised for any other purpose. Any exercise of

thorities granted under the TWEA during times of war, while section 1701 of the IEEPA, which also was enacted in 1977, sets out the requirements for the imposition of restrictions during "unusual and extraordinary threats" that are declared to be national emergencies.⁴² The President's power over substantive areas is slightly narrower under the IEEPA than under the original TWEA,⁴³ and the IEEPA requires that the President follow consultative procedures when declaring national emergencies.⁴⁴

The President must now report to Congress "in every possible instance" before exercising any authorities granted by the IEEPA.⁴⁵ If the President neglects to consult Congress before exercising any of the authorities, "he shall immediately transmit to the Congress a report" concerning such exercise.⁴⁶ In addition, once the initial consultation has been made, whether before or after the President exercises the authorities, periodic follow-up reports must be given to Congress at least once during each subsequent six-month period.⁴⁷

When Congress amended the TWEA to narrow the President's authority to declare national emergencies, it included a grandfather clause in the IEEPA.⁴⁸ This provided that the authorities conferred upon the President by section 5(b) of the TWEA that were being exercised with respect to a country on July 1, 1977 could continue to be exercised by the President under the savings clause of the IEEPA without the need for additional action.⁴⁹ The consultative procedures set out in the IEEPA need not be followed in those instances.

The Cuban Assets Control Regulations were imposed in 1963 under the authority held by the President under the TWEA.⁵⁰ These regulations constituted a broad embargo on Cuba and were "originally adopted to deal with the peacetime emergency created by Cu-

such authorities to deal with any new threat shall be based on a new declaration of national emergency which must be with respect to such threat.

⁴² See *supra* notes 40-41.

⁴³ Unlike under the TWEA, in a declared emergency under the IEEPA the President may not exercise the powers to take title to foreign property, to regulate purely domestic transactions, to regulate gold or bullion, or to seize records. See H.R. REP. NO. 459, 95th Cong., 1st Sess. 14-15 (1977) [hereinafter cited as HOUSE REPORT].

⁴⁴ 50 U.S.C. § 1703. See *supra* note 4 for the text of the provision.

⁴⁵ 50 U.S.C. § 1703(a).

⁴⁶ *Id.* § 1703(b).

⁴⁷ *Id.* § 1703(c).

⁴⁸ *Id.* § 1706(a). See *supra* note 3 for the text of the provision.

⁴⁹ 50 U.S.C. § 1706(a).

⁵⁰ 31 C.F.R. § 515 (1984). See Cuban Assets Control Regulations, 28 Fed. Reg. 6974 (1963) (filed July 8, 1963). Alternative statutory authority for the Cuban Assets Control Regulations may be found in the Foreign Assistance Act of 1961, Pub. L. No. 87-195, 75 Stat. 424. See 28 Fed. Reg. 6974 (1963). 22 U.S.C. § 2370(a)(1) (1982) provides:

No assistance shall be furnished under this chapter to the present government of Cuba. As an additional means of implementing and carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba.

ban attempts to destabilize governments throughout Latin America."⁵¹

Regulation 560 was added to the Cuban Assets Control Regulations in 1977 and contained a general license that permitted payment of travel-related expenses in Cuba by persons visiting that country.⁵² Payment of such travel-related expenses had been prohibited previously under the embargo established by the Cuban Assets Control Regulations.⁵³ In 1982 Regulation 560 was amended to its current state of prohibiting payment of expenses incident to travel to Cuba to "reduce Cuba's hard currency earnings from travel by U.S. persons to and within Cuba."⁵⁴ The TWEA amendments and the IEEPA had already taken effect when Regulation 560 was amended in 1982, and the consultative procedures of the IEEPA had not been followed in setting out this regulation.

Travel restrictions historically have been viewed differently from other commercial regulations.⁵⁵ Although the right to travel is not absolute, the Court has recognized it as a right that is guaranteed by the due process clause of the fifth amendment.⁵⁶ Limitations on this right can be justified if foreign policy considerations support such

⁵¹ *Wald*, 104 S. Ct. at 3030. The President had authority at that time under § 5 of the TWEA to impose broad embargoes on foreign countries in time of war or during any other period of national emergency. Similar embargoes are in effect against North Korea, North Vietnam, Cambodia, and South Vietnam. See 31 C.F.R. § 500.201 (1984).

⁵² Cuban Assets Control Regulations, 42 Fed. Reg. 16,621 (1977). Regulation 560 was passed on March 21, 1977 and was amended on May 12, 1977 to further liberalize travel-related transactions with Cuba. Transactions Incident to Authorized Travel to Cuba, 42 Fed. Reg. 25,499 (1977).

⁵³ 31 C.F.R. § 515.

⁵⁴ *Id.* Section 515.560 was amended on April 19, 1982, Cuban Assets Control Regulations: Travel Related Transactions, 47 Fed. Reg. 17,030 (1982), and again on July 21, 1982, 47 Fed. Reg. 32,060 (1982). The 1982 amendments were noted to be "an important part of this Government's policy of tightening the current trade and financial embargo against Cuba." Crossette, *U.S. Linking Cuba to 'Violence' Blocks Tourist and Business Trips*, N.Y. Times, Apr. 20, 1982, at A1, col. 4.

⁵⁵ See *supra* notes 22, 36, 37. See Benjamin & Treloar, *Area Restrictions and the Right to Travel Abroad*, 8 U.C.D. L. REV. 401 (1975); Velvel, *Geographical Restrictions on Travel: The Real World and the First Amendment*, 15 U. KAN. L. REV. 35 (1966); Rauh & Pollitt, *Restrictions on the Right to Travel*, 13 W. RES. L. REV. 128 (1961); Comment, *The Right to Travel and Passport Revocation: Haig v. Agee*, 8 BROOKLYN J. INT'L L. 391 (1982); Comment, *Judicial Review of the Right to Travel: A Proposal*, 42 WASH. L. REV. 873 (1967); Note, *Constitutional Protection of Foreign Travel*, 81 COLUM. L. REV. 902 (1981); Note, *The Right to Travel Abroad*, 42 FORDHAM L. REV. 838 (1974); Note, *Constitutional Law: Resolving Conflict Between the Right to Travel and Implementation of Foreign Policy*, 1966 DUKE L.J. 233; Note, *Travel and the First Amendment: Zemel v. Rusk*, 13 UCLA L. REV. 470 (1966); Note, *Constitutional Law: Right to Travel Versus Power to Conduct Foreign Affairs: Area Restrictions on Passports: Zemel v. Rusk*, 50 CORNELL L. Q. 262 (1965); Recent Development, *Regulation Prohibiting Transactions Incident to Travel to, from, or Within Cuba Held Constitutional: U.S. v. Fernandez-Pertierra*, 17 TEX. INT'L L.J. 529 (1982).

⁵⁶ The Court first recognized such a right in 1958. *Kent*, 357 U.S. at 125. See *supra* note 21 and accompanying text. Distinction has since been drawn between a freedom to travel outside the United States and a right to travel within the United States. *Haig v. Agee*, 453 U.S. 280, 306 (1981); *Califano v. Aznavorian*, 439 U.S. 170, 176-77 (1978).

restrictions,⁵⁷ and the Court will defer to the political branches in deciding what constitutes a significant matter of foreign policy.⁵⁸

The *Wald* decision allows the President to impose additional economic restrictions with regard to a country, without following the IEEPA consultative procedures, as long as some TWEA restrictions were in effect at the time the IEEPA grandfather clause was enacted. Thus, *Wald* broadens the scope of the President's authority in such situations.

Although *Wald* does not affect the validity of the IEEPA provisions when applied to countries that did not have TWEA restrictions in force against them on July 1, 1977, it does allow the President to continue to act under the sole authority of the TWEA with regard to some countries. This gives the President greater power to impose additional restrictions at will with regard to those countries. The President does not have to consult with Congress on those restrictions or make periodic reports as required under the IEEPA, because these procedures were not required under the TWEA.

In rejecting the court of appeals reasoning, which was based on the use of specific language, legislative history, and underlying purpose of the TWEA, the Court failed to consider seriously these factors. The dissent criticized: "[t]o achieve its labored result, the Court invokes a series of platitudes on statutory interpretation, but ignores their application to this case."⁵⁹

The Court found that the use of "authorities" instead of the more narrow term "restrictions" in the language of the grandfather clause indicated the need for a broad interpretation. In so doing, the Court overemphasized the importance of the use of "authorities" in the provision. The following dialogue between Congressman Cavanaugh and Mr. Bergsten of the Treasury Department, the Carter Administration's principal spokesman for the amendments, shows the Committee's principal concerns and indicates how the executive interpreted the clause:

MR. CAVANAUGH. . . . First of all, Mr. Bergsten, would it be your understanding that [the savings clause] would strictly limit and restrict the grandfathering of powers currently being exercised under 5(b) [of the TWEA] to those specific uses of the authorities granted in 5(b) being employed as of June 1, 1977.

MR. BERGSTEN. Yes, sir.

⁵⁷ On occasion, the Court has found foreign policy justifications sufficient to overcome the fifth amendment right to travel. See, e.g., *Zemel*, 381 U.S. 1 (Secretary of State could refuse to validate passports for travel to Cuba where a general ban on such travel was in effect).

⁵⁸ The Court noted that its earlier holding in *Zemel* "was not tied to the Court's independent foreign policy analysis." *Wald*, 104 S. Ct. at 3039. Matters relating "to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of governments as to be largely immune from judicial inquiry or interference." *Harisiades*, 342 U.S. at 589 (footnote omitted).

⁵⁹ *Wald*, 104 S. Ct. at 3045.

MR. CAVANAUGH. And it would preclude the expansion by the President of the authorities that might be included in 5(b) but are not being employed as of June 1, 1977.

MR. BERGSTEN. That is right.⁶⁰

It was the understanding of both the Committee and the executive that only those restrictions existing on July 1, 1977 would fall within the scope of the grandfather clause. The discussions were not focused on the "authorities," but rather, on the "specific uses of the authorities"—the specific restrictions in effect at that time. Therefore, the use of the word "authorities" in the clause should not be controlling, as the Court has so interpreted.

The *Wald* Court did not give sufficient weight to the legislative history, which shows a congressional intent to narrow the scope of the President's authority to impose TWEA restrictions.⁶¹ Addressing the legislative history, the Court stated: "Oral testimony of witnesses and individual Congressmen, unless very precisely directed to the intended meaning of particular words in a statute, can seldom be expected to be as precise as the enacted language itself."⁶² While this may be true, Justice Blackmun, who found sufficient evidence of congressional intent to narrow the President's authority in the legislative history, noted in his dissent that "[t]he Court rejects this narrow interpretation in favor of one that loses all sight of the general legislative purpose of the IEEPA and the clear legislative intent behind the grandfather clause."⁶³

⁶⁰ *Revision of Trading with the Enemy Act: Markup Before the House Comm. on International Relations*, 95th Cong., 1st Sess. 21 (1977) [hereinafter cited as *House Markup*].

⁶¹ See generally *Emergency Controls on International Economic Transactions: Hearings Before the Subcomm. on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 21 (1977) [hereinafter *Subcomm. Hearings*].

The Senate Report on Public Law 95-223 stated that the purpose of the Bill was "to revise and delimit the President's authority to regulate international economic transactions during wars or national emergencies." S. REP. NO. 466, 95th Cong., 1st Sess. 1, 2, reprinted in 1977 U.S. CODE CONG. & AD. NEWS 4540, 4541 [hereinafter cited as *SENATE REPORT*]. See Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102 (1983) (IEEPA was a result of Congress' efforts to limit presidential power and reclaim supposedly usurped authority).

⁶² *Wald*, 104 S. Ct. at 3036.

⁶³ *Id.* at 3045. The Senate thought the bill was necessary to address two situations: extensive presidential use of emergency authority under § 5(b) of the TWEA to regulate economic transactions unrelated to declared national emergencies; and passage of the National Emergencies Act of 1977, which provided congressional safeguards in declaring and terminating national emergencies; but which exempted § 5(b) of the TWEA. *SENATE REPORT*, *supra* note 61, at 2, reprinted in 1977 U.S. CODE CONG. & AD. NEWS at 4541.

The House shared this view, stating:

[S]ection 5(b) has become essentially an unlimited grant of authority for the President to exercise, at his discretion, broad powers in both the domestic and international economic arena, without congressional review. These powers may be exercised so long as there is an unterminated declaration of national emergency on the books, whether or not the situation with respect to which the emergency was declared bears any relationship to the situation with respect to which the President is using the authorities.

HOUSE REPORT, *supra* note 43, at 7.

When the TWEA amendments and the IEEPA were being discussed in the House subcommittee, some members wanted to restrict as much as possible the President's authority to impose restrictions pursuant to a national emergency.⁶⁴ They felt that a grandfather clause was not desirable and that the existing regulations should be allowed to expire. The subcommittee heard testimony, however, that such a clause was needed to protect the President's negotiating position with other countries.⁶⁵ Such a clause would prevent the President from having to declare or reassert a national emergency with regard to certain countries to continue existing restrictions, which would require a political act with international political impact.

The subcommittee deleted one clause from the IEEPA grandfather clause because the members believed that the clause would not adequately narrow the President's authority and could give him authority not already exercised under section 5.⁶⁶ When the full House committee discussed the grandfather clause after this deletion, the scope of the clause was debated.⁶⁷ The Committee was concerned that the President not have the authority to impose additional restrictions under the savings clause.⁶⁸ There would have been no

⁶⁴ See, e.g., *Subcomm. Hearings, supra* note 61, at 167-69, 198 (remarks of Rep. Cavanaugh); *id.* at 210 (remarks of Rep. Findley).

⁶⁵ See, e.g., *id.* at 19 (statement of Prof. Lowenfeld); *id.* at 103, 113, 119 (statements of Assistant Treasury Secretary Bergsten); *id.* at 209-10 (remarks of Mr. Santos, Treasury Department attorney adviser).

⁶⁶ An early form of the grandfather clause considered by the subcommittee contained two subparts:

- (1) any authority conferred upon the President by section 5(b) of the Trading with the Enemy Act, which is being exercised with respect to a set of circumstances on the date of the enactment of this Act as a result of a national emergency declared by the President before such date of enactment, may continue to be exercised with respect to such set of circumstances; and
- (2) any other authority conferred upon the President by that section may be exercised to deal with the same set of circumstances.

Subcommittee Staff Director R. Roger Majak explained the purposes of subsection (2) in the following manner:

With respect to any uses of 5(b) authorities for any presently existing situation, not only could the President use those particular authorities that he is now using, but any others which are conferred by section 5(b). So if the President is presently using asset controls toward a particular country, but is not using, let us say, currency controls, he nonetheless could use, at some later date if he so desired, currency controls with respect to the situation. . . . I think it boils down to a question of whether we are grandfathering a particular situation, and all the powers that may be necessary to deal with the situation, or whether we are grandfathering the particular authorities themselves in their usage.

Subcomm. Hearings, supra note 61, at 167.

⁶⁷ *House Markup, supra* note 60, at 21.

⁶⁸ *Id.* It is also important to note that Congress was not persuaded that an emergency situation toward Cuba existed. See *HOUSE REPORT, supra* note 43, at 10 (grandfathering "existing uses of these powers, without either endorsing or disclaiming" them is in line with committee's purpose); *id.* at 11 (few current uses could be justified as responding to existing emergencies); *id.* (emergencies are by nature rare and brief; not normal, ongoing problems); *Subcomm. Hearings, supra* note 61, at 110 (threat of communist competition in

need for this concern if the President already had the authority to impose additional restrictions where any authority was being exercised at that time.

According to the *Wald* Court, the prime purpose of the grandfather clause was to keep the bill that contained it from becoming too controversial and bogging down in partisan disputes.⁶⁹ In support of this view, the Court cited the House Report, which discusses the need to grandfather "existing uses" of the powers and to assure improved future uses.⁷⁰ As the dissent noted, these statements are supportive of a narrow interpretation of the grandfather clause even if its purpose was to avoid partisan dispute.⁷¹

The need for a grandfather clause to protect the President's negotiating position with other countries is an important consideration, but is of little if any significance with regard to the reimposition of Cuban travel restrictions. Because a new public statement had to be made when the general license was amended to restrict travel in 1982, the President's acting in accordance with the consultative procedures would not have created additional problems or tensions in Cuban or other foreign relations.⁷² Thus, the purposes of the grandfather clause would not have been violated if the President had followed the consultative and reporting procedures.

Wald effectively defeats congressional intent to narrow the President's authority to impose additional restrictions. Where the IEEPA provisions apply, the declaration of national emergencies is likely to occur less frequently and with greater consensus in Congress of the need for such a declaration. In addition, the continuation of such a declaration can be monitored more closely because the President is required to report to Congress regarding the situation at least once every six months. This requirement would prevent a declaration of national emergency from remaining in effect longer than necessary, and reevaluation of the declaration of a national emergency would occur regularly.

When the President imposes restrictions under the TWEA, it is a more serious matter for Congress to consider whether the restric-

the world is not an emergency unless one considers it a permanent emergency); *id.* at 198 (President can propose to Congress that emergencies "do not exist and cannot be justified" but should be allowed to continue); *id.* at 210 (reference to the "phony character" of the emergency regarding Cuba).

⁶⁹ *Wald*, 104 S. Ct. at 3037. See *Subcomm. Hearings*, *supra* note 61, at 198-200. "This is essentially an act trying to clear up the mess that the Trading With the Enemy Act has left us in. We can always move on the front of Vietnam or Cuba. . . . However, to get this through in reasonably good form, we would like not to raise that particular controversy." *Id.* at 210.

⁷⁰ *Wald*, 104 S. Ct. at 3037. See *HOUSE REPORT*, *supra* note 43, at 9-10.

⁷¹ *Wald*, 104 S. Ct. at 3047 ("the passage provides strong support for exactly the interpretation that the Court rejects").

⁷² *House Markup*, *supra* note 60, at 7-8; *Subcomm. Hearings*, *supra* note 61, at 168-69, 200, 207.

tions are justified than if the restrictions are imposed under the IEEPA. Because no consultative or reporting procedures are required by the TWEA, congressional debate on the restrictions necessarily would indicate some dissatisfaction with the President's actions. This could cause or increase tensions with the affected country or with other countries that have some interest in the situation.

The *Wald* Court's deference to the executive in its broad interpretation of the grandfather clause is unwarranted. Interpretation of the TWEA and the IEEPA necessarily involve issues of foreign policy, but foreign policy inherently is involved in any trade or other economic relationship with a foreign country or foreign national. While the effect of the travel restrictions is desirable to limit Cuba's ability to acquire hard currency, the manner in which such restrictions were achieved is not desirable. As Justice Powell noted in his dissent, the Court's role is "limited, however, to ascertaining and sustaining the intent of Congress. It is the responsibility of the President and Congress to determine the course of the nation's foreign affairs."⁷³ By disregarding the clear intent of Congress and expanding the President's authority in this instance, the Court acted outside its limited role. The Court first determined the result it desired and then formulated the justification for that result, effectively becoming an active participant in determining the course of foreign policy.

The legislative history clearly shows that Congress intended to limit the President's assertion of restrictions to those in effect at the time of the enactment of the grandfather clause. *Wald* unfortunately encourages inconsistency in United States economic relations with other countries by allowing the President to exercise authority that Congress did not intend to grant to the President.

The Court's ruling on the constitutionality of the travel restrictions, however, is sound if it is assumed that the President had acted within his authority in imposing the restrictions.⁷⁴ If the IEEPA can be used to impose additional restrictions pursuant to a declared national emergency, foreign policy considerations should be great enough to justify a constitutional prohibition on travel.

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⁷³ *Wald*, 104 S. Ct. at 3049.

⁷⁴ See *supra* notes 20-22, 35, 36.

